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No.

IN THE

Supreme Court of the United States

CITY OF NEWARK; NEWARK POLICE DEPARTMENT; JOSEPH J. SANTIAGO, NEWARK POLICE DIRECTOR; THOMAS C. O'REILLY, NEWARK POLICE CHIEF OF POLICE,

Petitioners,

v.

FRATERNAL ORDER OF POLICE NEWARK LODGE NO. 12; FARUQ ABDUL-AZIZ; SHAKOOR MUSTAFA,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether the City of Newark Police Department violates the Free Exercise Clause of the First Amendment of the United States Constitution by applying a grooming policy to its police officers to ensure their safety, establish discipline and create espirt de corps?

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Petitioners City of Newark; Newark Police Department; Joseph J. Santiago, Newark Police Director; Thomas C. O'Reilly, Newark Chief of Police (hereinafter "City of Newark" or "Petitioners") respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit (hereinafter "Third Circuit"), which affirms the United States District Court judgment that the City of Newark Chief of Police Special Order No. 71-15 (hereinafter "Order 71-15") violates the First Amendment of the United States Constitution. The City of Newark denies the neutral application of Order 71-15 violates the First Amendment, since it advances its compelling interest in the effective functioning of its Police Department. The judgment of the Third Circuit creates a myriad of religious exceptions to the orderly administration of the Newark Police Department.

OPINIONS BELOW

On July 29, 1997, the Honorable John W. Bissell, Judge of the United States District Court for the District of New Jersey, granted a permanent injunction based upon his finding of a violation of 42 U.S.C.A. § 1983, the First Amendment and the Fourteenth Amendments of the United States Constitution. The opinion is reproduced herein as Appendix "C". The August 26, 1997 Order permanently enjoining the City of Newark from enforcing its grooming policy is reproduced herein as Appendix "D". On October 6, 1997, Judge Bissell awarded counsel fees with taxable costs against the Petitioners in this matter. The March 3, 1999 judgment and opinion of the United States Court of Appeals for the Third Circuit affirming the decision of Judge Bissell and awarding taxable costs to appellees is reproduced herein as Appendix "A & B".

STATEMENT OF JURISDICTION

The jurisdiction of this Court to review the March 3, 1999 judgment of the United States Court of Appeal for the Third Circuit is invoked under Title 28 of the United States Code, Section 1254(1). This Petition for Certiorari is timely filed on Tuesday, June 1, 1999, which is the ninetieth day after the March 3, 1999 judgment and opinion of the United States Court of Appeal for the Third Circuit.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The Fourteenth Amendment to the United States Constitution, Section 1, provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty. Or property, without due

process of law; nor deny to any person within its jurisdiction the equal protection of its laws.

42 U.S.C. § 1983. Civil action for deprivation or rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

A. Factual Background

The City of Newark is a municipality in the New Jersey Civil Service Employer Act. It is subject to various state regulations generally, and specific regulations when it attempts to discipline its employees. The City of Newark must issue a Preliminary Notice of Disciplinary Action with

the attached specification. If the employee requests a hearing, it is granted. Pursuant to state regulations and the collective bargaining agreement, Police Officers are represented by attorneys and by union representatives at their hearings.

On March 23, 1971, Anthony Barres, Chief of Police for the City of Newark, issued Special Order from the Chief of Police No. 71-15, which sets the standards of appearance for hair style and facial hair growths worn by Police Officers. Special Order 71-15 is otherwise known as the grooming policy.

On November 21, 1995, Jack McEntee, President of the Newark FOP and the FOP filed a verified complaint with the Department of Law & Public Safety, Division of Civil Rights, alleging discrimination on the basis of race and disability. Specifically, the complaint alleges police officers with the medical conditions prohibiting them from shaving, were transferred to positions which were less favorable and prohibited from working other assignments. On or about March 11, 1996, the matter was transmitted to the Equal Employment Opportunity Commission for an investigation into the allegations against the City of Newark.

On July 25, 1996, Shakoor Mustafa was served with a Preliminary Notice of Disciplinary Action for failing to conform to the Special Order from the Chief of Police No. 71-15.

On January 13, 1997, Joseph Santiago, Police Director of the Newark Police Department, caused a Preliminary Notice of Disciplinary Action to be issued against Police Officer Faruq Abdul-Aziz for failing to conform to the Department's grooming policy.

On January 24, 1997, Thomas C. O'Reilly issued Memorandum from the Chief of Police Memo No. 97-30, which advised all bureau commanders to submit a list of those police personnel who were not in compliance with the grooming standards set by the department. On February 4, 1997, Jack McEntee, President of the Newark FOP and the FOP filed an amended verified complaint with the Department of Law & Public Safety, Division of Civil Rights, with the approval of Rolando Torres, Jr., Director of the Division on Civil Rights amending paragraphs 3 and 4.

As a result of court actions and postponements, the disciplinary actions involving Aziz and Mustafa were scheduled for a hearing on May 22, 1997. On May 21, 1997, plaintiffs filed a verified complaint in United States District Court seeking a temporary injunction prohibiting the City of Newark from conducting a disciplinary hearing the next day. On July 29, 1997, Judge Bissell granted a permanent injunction based upon a violation of 42 U.S.C.A. § 1983 and the First Amendment of the United States Constitution. On October 6, 1997, Judge Bissell awarded counsel fees with taxable costs to plaintiff. The plaintiff's have not been forced to shave pursuant to the government's grooming.

The City of Newark arrives at this Court to request that the permanent injunction in this case be vacated and allow it to effectively manage its police department without regard to the religion of its members.

B. The City Of Newark's Arguments And Their Treatment Below

At every level of review in this matter the City of Newark has argued that Order 71-15 is a rule of general

applicability and does not discriminate against the respondents in this matter. As a result, this matter is controlled by *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872, 110 S. Ct. 1595, 108 L. Ed. 2d 876 (1990), *rehearing denied*, 496 U.S. 913, 110 S. Ct. 2605, 110 L. Ed. 2d 285, *on remand*, 799 P.2d 148, 310 Or. 376 (1990), and the applicable test is the rational relationship test for regulations that are generally applicable and do not discriminate on the basis of religion.

The City of Newark relies upon *Marshall v. District of Columbia*, 559 F.2d 726 (D.C. Cir. 1977), which determined a grooming regulation was not arbitrary and capricious and did not violate a police officer's religion. *Id.* at 727. The City of Newark argues that its grooming policy is rationally connected to the effective functioning of the [Police] department. The City of Newark argued in the United States District Court and the Third Circuit that *Kelly v. Johnson*, 425 U.S. 238, 96 S. Ct. 1440, 47 L. Ed. 2d 708 (1976), stands for the proposition that a grooming policy in the police department does not violate a police officer's rights under the First and Fourteenth Amendments.

The City of Newark argued that courts should give great deference to the judgment of the Newark Police Director pursuant to *Goldman v. Weinberger*, 475 U.S. 503, 106 S. Ct. 1310, 1313, 89 L. Ed. 2d 478 (1986); *Blanken v. Ohio Department of Rehabilitation and Corrections*, 944 F. Supp. 1359, 1366 (S.D. Oh. 1996); *Bell v. Wolfish*, 441 U.S. 520, 547, 99 S. Ct. 1861, 1878, 60 L. Ed. 2d 447 (1974); *Procunier v. Martinez*, 416 U.S. 396, 405, 94 S. Ct. 1800, 1807, 40 L. Ed. 2d 224 (1974); *Lawson v. Singletary*, 85 F.3d 502, 512 (11th Cir. 1996). Newark argued its grooming policy advanced its compelling interest in the effective

functioning of its police department by making police officers recognizable to the public, establishing discipline and fostering Esprit de corps. The grooming policy is intended to present a professional and dignified image to the public, thereby creating trust and respect from the public and co-workers. When officers fail to meet the standards set by the Newark Police Department, it is quickly perceived as rebellion and divisive. The City of Newark believes that the Newark Police Director is uniquely qualified to determine how to manage its police department, so it alcoves its compelling interest of providing police protection within its borders.

The City of Newark argued there is no right to absolute freedom of religious exercise in the United States of America. There must be a balancing of compelling government interests and the individual's religious exercise or practise. Certainly an incidental burden on an individual's religious belief is not a violation of the First Amendment of the United States Constitution.

The City of Newark also argued that police officers are members of a highly regulated industry and have a lower expectation to freely act as they wish. Case law involving police officers and public safety employees clearly establishes this point. "Both the federal courts and our New Jersey courts have found that persons who engage in industries 'subject to close supervision and inspection' " have a diminished expectation of privacy. *In re Martin*, 90 N.J. 295, 310-16 (1982) (allowing New Jersey Division of Gaming Enforcement to conduct suspicionless searches of casino Licensees); *United States v. Biswell*, 406 U.S. 311, 92 S. Ct. 1593, 32 L. Ed. 2d 87 (1972) (upholding suspicionless search of gun dealer's locked storeroom);

Colonnade Catering Corp. v. United States, 397 U.S. 72, 90 S. Ct. 774, 25 L. Ed. 2d 60 (1970) (permitting suspicionless searches of premises of liquor licensees); *New Jersey Dep't of Envtl. Protection v. Duran*, 251 N.J. Super. 55, 62-63 (App. Div. 1991) (fishing industry); *Shoemaker v. Handel*, 795 F.2d 1136, 1141-43 (3rd Cir.), *cert. denied*, 479 U.S. 986, 107 S. Ct. 577, 93 L. Ed. 580 (1986) (upholding random breathalyzer and urine testing of licensed jockeys and other track personnel); *Policemen's Benevolent Ass'n of New Jersey, Local 318 v. Township of Washington*, 850 F.2d 133, 136-141 (3rd Cir. 1988) (police officers are members of highly regulated industry and are on notice their behavior must conform to various standards.)

REASONS FOR GRANTING THE WRIT

I.

THE MARCH 3, 1999 OPINION CONFLICTS WITH THE JUDGMENT OF THE THIRD CIRCUIT IN *PRISCILLA M. LIPPINCOTT ADAMS v. COMMISSIONER OF INTERNAL REVENUE SERVICE*, WHICH WAS DECIDED ON MARCH 4, 1999.

Remarkably, on March 4, 1999, one day after the case subjudice, the Third Circuit in *Priscilla M. Lippincott Adams v. Commissioner of the Internal Revenue Service*, Docket Nos. 98-7200 issued a ruling in direct contradiction to this matter. In this case, Priscilla Adams was a devout Quacker who worked as a "Peace Field Secretary" for the Philadelphia Yearly Meeting of the Religious Society of Friends. In exercising her religious beliefs, Adams felt the payment of her taxes, which could potentially fund the

military was against the will of God. As a result, she did not pay taxes from 1985 to 1989. The Commissioner of the Internal Revenue Service did not permit a religious exemption to the payment of taxes, despite numerous statutory exemptions, and assessed deficiencies and penalties for the years 1988, 1989, 1992, 1993, and 1994. The penalties and deficiencies were upheld in the Tax Court and the appeal was filed with the United States Court of Appeals for the Third Circuit.

The rule of this case is that ". . . neutral, generally applicable laws may impinge on religious practices, even in the absence of a compelling state interest." *See Smith* at 494 U.S. 882-884; *Boerne v. City of Flores*, 117 S. Ct. 2157, 2161 (1997); *Adams* at page 4. In *Adams*, the Third Circuit found that the interest of maintaining a sound tax system was so compelling that when it was balanced against the religious belief, the government's interest prevailed. Certainly the City of Newark makes the same argument that the efficient operation of its police department is such a compelling interest it outweighs the religious beliefs in its case. The *Adams'* court determined it would curtail the effectiveness of the Internal Revenue Service to consider the plethora of religious exceptions, which would flow from the wide variety of religious beliefs. The City of Newark Police Department will suffer from these consequences given the Third Circuit ruling in our case. The City of Newark must now accommodate any request for a religious exemption to any of its policies whenever a police officer has a religious belief the officer deems is in conflict with our rules and regulations. The City of Newark would be forced to become an expert in every religion and guess whether its policies will be interpreted as compelling by

the courts, or spend excessive amounts of public funds in costs and lawyer's fees frivolously if it is wrong.

The opinion in *Adams* cites *New Colonial Ice Co. v. Helviering*, 292 U.S. 435 (1934) *Adams* at 14, for the proposition that the courts are not encouraged to create exceptions to the statutory scheme. The *Adams* court stated tax exemptions are a matter of legislative grace. The City of Newark contends its executive authority to create and administrate its policies are equally as important as the legislative rules and regulations and deserve the same deference by the courts to its determinations. Essentially, the United States District Court and the United States Court of Appeals for the Third Circuit have substituted their judgment for that of the Joseph J. Santiago, Police Director, who has over twenty years of experience as a police officer, superior officer and police director combined. The City of Newark is now penalized by the courts, because the United States District Court and Third Circuit Court Judges do not understand the realities of running a large urban police department, particularly one that was involved in a major scandal when Director Santiago accepted the position of police director.

Crain v. Board of Police Commissioners of the Metropolitan Police Department of the City of St. Louis, 920 F.2d 1402 (8th Cir. 1991) is particularly relevant for two reasons. First, it stands for the proposition that the courts must give due deference to municipal agencies and, second, the relational relationship applies to regulations affecting certain municipal employees. In *Crain* a former police officer and a current police officer brought an action for injunctive and declaratory relief under 42 U.S.C. § 1983 against the City of St. Louis and its municipal agencies.

The police officers alleged in their complaint that the sick leave regulation violated their constitutional rights under the First and Fourteenth Amendments. Specifically, they alleged it violated their right to their free exercise of religion, to vote, to travel, and to freely associate.

The standard of review applied in *Crain* to analyze municipal regulations in the police department was the rational relationship test. The *Crain* Court concluded ". . . that the Police Department's sick leave regulations must be reviewed deferentially and that appellants [the police officers] must show that the regulations bear no rational relationship to a legitimate state interest." *Id.* at 1406. *Crain* is particularly relevant, because the Special Order involved in this case forbid police officers from leaving their residences for non-medical reasons. The sick leave regulation allowed officers to leave the residence for medical reasons, but not for religious reasons.

The *Crain* Court neglected to use the heighten scrutiny test and did not require the City of St. Louis to present a compelling reason why it allowed a secular exception and not a religious reason as the Third Circuit did in the case subjudice. The *Crain* Court correctly placed the burden on the police officers to show the sick leave regulation was not rationally related to its stated interests of ". . . safety and morale by expediting the recovery of sick officers, minimizing the burden on officers who may have to work longer hours while other officers are out sick, and assuring that officers on sick leave are not malingering and that the sick leave policy is not abused." *Id.* at 1409. As a result, the Court deferred to the judgment of the St. Louis Police Department while relying upon numerous cases. *See generally Hambsch v. Department of Treasury*, 796 F.2d

430, 434 (Fed. Cir. 1986) (regulations which prohibit secret service agents on sick leave from leaving the Washington D.C. metropolitan area are rationally related to "[the] [s]ervice's interest in fostering public safety by contributing to the efficient operations of the Service" and are not an unconstitutional violation of agents' right to travel); *Korenyi v. Department of Sanitation*, 699 F. Supp. 388 (E.D.N.Y. 1988) (analyzing each constitutional right separately, court found that sick leave regulations did not unconstitutionally infringe on sanitation workers' rights to travel, consult with counsel, associate freely, vote and freely exercise their religion); *Voorhees v. Shull*, 686 F. Supp. 389, 394-395 (E.D.N.Y. 1987) (standard of review "depends not on the nature of the right involved, but on the character of the challenger," rational relationship standard is appropriate when challenger is municipal employee and restrictive sick leave regulations are rationally related to police department's interest in public safety and efficiency); *Serge v. City of Scranton*, 610 F. Supp. 1086 (M.D. Pa. 1985) (rational relationship standard is proper standard for reviewing sick leave regulations when plaintiff is not average citizen but employee of the police force; case remanded for more detailed pleadings); *Philadelphia Lodge No. 5, Fraternal Order of Police v. City of Philadelphia*, 599 F. Supp. 254 (E.D. Pa. 1984) (rational relationship standard used to judge regulations promulgated by city as employer; sick leave regulations that restrict police officers' and firefighters' rights to vote, travel, privacy, and free exercise of religion are rationally related to city's interest in providing sufficient staffing, reducing costs, and improving morale), *aff'd sub nom., Local 22, Int'l Ass'n of Firefighters v. City of Philadelphia*, 779 F.2d 43 (3rd Cir. 1985); *Loughran v. Codd*, 432 F. Supp. 259 (E.D.N.Y. 1976) (because plaintiff is employee of New York City Police

Department and not ordinary citizen, proper standard of review is rational relationship test and sick leave regulations are unquestionably rationally related to city's interest in efficiently managing the department and preventing abuses.)

Crain follows the reasoning in *Kelly v. Johnson*, *supra*, when it applied a different standard of review involving the constitutional rights of a police officer as opposed to an ordinary citizen. *Id.* at 1407; *See Kelly* 425 U.S. at 244-245. Again, the City of Newark contends there is ample case law for its proposition that court should give due deference to the Police Director and the correct standard of review is the rational relationship test.

As a result of the foregoing, the Third Circuit decision in this matter is inconsistent with decisions of the Supreme Court, other Third Circuit decisions and various other circuit courts, and a writ of certiorari should issue.

II.

THE MARCH 3, 1999 JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT CONFLICTS WITH THE DECISION OF THE NEW JERSEY SUPREME JUDGMENT IN *AKRIDGE v. BARRES*, 122 N.J. SUPER. 476, 300 A.2d 866 (APP. DIV. 1973), *AFFIRMED*, 65 N.J. 266, 321 A.2d 230 (1974).

On February 23, 1973, the New Jersey Appellate Division concluded Order 71-15 did not violate the First Amendment of the United States Constitution. "It is no longer open to question that members of a police department 'in many respects constitute a military organization,'

16 McQuillin, Municipal Corporations (3d ed., 1972 rev'd vol.), § 45.16 at 621, and as such are necessarily subject to reasonable regulations having to do with discipline and morale." *Id.* at 477. *See Ward v. Keenan*, 3 N.J. 298, 70 A.2d 77 (1949); *Rivell v. Civil Service Commission*, 115 N.J. Super. 64, 278 A.2d 218 (App. Div. 1971); *Newark v. Massey*, 93 N.J. Super. 317, 225 A.2d 723 (App. Div. 1967); N.J.S.A. 40A:14-118. The Appellate Division found and the New Jersey Supreme Court affirmed the premise that a police department has a ". . . legitimate interest in the appearance of its members, including the length and style of head and facial hair and such regulation would not violate the First Amendment." *Akridge* at 477-478. As a result, the United States Court of Appeals for the Third Circuit judgment is in conflict with the New Jersey Supreme decision in *Akridge*.

The City of Newark Police Department is a quasi-military entity which is authorized by law to use deadly force, when necessary, on a daily basis. The City of Newark has a compelling interest in the management of its police department. This interest is no less important because it is a police department and not a military unit. However, in light of *Crain*, *supra*, a police department is a paramilitary agency and "[t]he legitimacy of the Police Board's interest is obvious. '[A] police department has a substantial interest in developing 'discipline, esprit de corps, and uniformity within its ranks so as to insure the safety of persons and property." *Id.* at 1409, quoting *Hughes v. Whitmer*, 714 F.2d 1407, 1419 (8th Cir. 1983) (quoting *Kelly*, 425 at 246). If case law and our experience indicate enforcement of our grooming policy helps establish discipline within the ranks, team spirit and solidarity, the United States Court of Appeals for the Third Circuit decision is incorrect and at odds with

the Supreme Court, Eighth Circuit and the Supreme Court of the State of New Jersey.

III.

THE THIRD CIRCUIT DECISION CREATES A SUPERIOR RELIGIOUS RIGHT, WHICH DISCRIMINATES AGAINST THE MAJORITY OF THE OFFICERS IN THE NEWARK POLICE DEPARTMENT, AND IS ARBITRARY AND CAPRICIOUS.

The rationale of the United States Court of Appeals in its March 3, 1999 opinion states the City of Newark discriminates against the Sunni Muslims, because it does not have a compelling interest for denying a religious exception, although it provides a secular exception for undercover officers and medical conditions. There is no evidence in the record for the court arrive at this conclusion. More importantly, Aziz and Mustafa in their supplemental appendix presented evidence that the City of Newark assigned those officers with a medical condition to administrative positions, with little or no contact with the public. Therefore, when the City of Newark temporarily assigned police officers with a medical condition to communications and the cell block, and did not allow them to work parade details, it was not undermining its compelling interest in managing its police department, contrary to the Third Circuit opinion.

Moreover, the Memorandum from the Chief of Police, Memo No. 97-30 provides in relevant part the following:

> 2) Personnel who have received medical clearance shall be documented and updated to ensure that medical clearance is current.

> 3) A "*ZERO-TOLERANCE*" policy will be adhered to for those in non-compliance.

The problem with the United States Court of Appeals decision is it incorrectly assumes that a police officer with a medical clearance, has a permanent waiver from Order 71-15. This is simply not true in practice or given a fair reading of the above-mentioned passage. In addition, the Third Circuit assumes that a police officer with a medical clearance performs the same functions as officers who are not on a medical clearance. Again, the complaints to the Department of Law and Public Safety clearly establish this is not true. The officers in this complaint claim the City of Newark is discriminating against them on the basis of their race, because they have this temporary condition and it is affecting the assignments they are given. Therefore, by creating this permanent religious exception, the Third Circuit is creating a superior right, which is different and contrary to the goals of the Newark Police Department. Again, this analysis is in direct conflict with *Crain* since there was an exception to the sick leave policy for medical reasons, just as in this case. Therefore, if the City of St. Louis was not required to show a compelling interest in not allowing a religious reason to violate the sick leave policy, the City of Newark should not arbitrarily be forced to traverse this hurdle.

It follows from the Third Circuit decision at page 18a that if the medical exception undermines the City of Newark's interest, then the religious exception, which the Third Circuit has created, definitely undermines the City of Newark's interest in this matter. There is nothing in the record, as the Third Circuit concludes, that the department has made a value judgment in favor of secular motivations.

This is further supported, again, because of the lawsuits by those individuals that currently are allowed temporary medical waivers, but are denied those assignments where they would have significant contact with the public. As a result, the City of Newark is now forced to create a permanent class of police officers, who can not adequately perform the functions they were hired to perform. This situation occurs because the Third Circuit has refused to defer to the judgment of the Newark Police Director and acknowledge the numerous cases that support the city's argument that the rational relationship test is the appropriate test.

Since the decision of the Third Circuit is at odds with facts presented and the court moved from its judicial function into the world of the executive branch, it has legislated a new unacceptable religious right in the Newark Police Department and it has acted arbitrarily. As a result of this legislation by the Third Circuit, it has acted contrary to the United States Supreme Court in the *Kelly* case and the Eighth Circuit in *Crain*.

IV.

THE THIRD CIRCUIT DECISION DATED MARCH 3, 1999, REQUIRES THE CITY OF NEWARK TO CONSIDER RELIGIOUS BELIEFS AND PRACTICES WHILE ATTEMPTING TO ADMINISTER MANDATORY AND UNIFORM RULES AND REGULATIONS, WHICH DO NOT TAKE RELIGION INTO CONSIDERATION.

The March 3, 1999 decision by the United States Court of Appeals has an impact upon every police department in

the United States of America. The Third Circuit decision has an impact on every rule and regulation in police departments and any orders given in the field. In an organization, where the reasonable and lawful orders of a superior officer are expected to carried out without objection and debate, the Third Circuit has issued a decision that requires every superior officer to become an expert in various religions and seriously negates the ability of the police department to provide police protection. By creating this superior religious right, the Third Circuit has created a split in Newark Police Department, because now officers don't know how religious officers are going to respond in any given situation. The City of Newark has police officers, and religious police officers. The religious police officer's knew the City of Newark's policy when they joined the police department. Respondent, Aziz was employed by the Newark Police Department in 1989 and Respondent, Mustafa has been on the department since at least 1986.

Since the United States Supreme Court has determined that a police department or military grooming policy does not offend the United States Constitution, the City of Newark requests a writ of certiorari to provide guidance to the City of Newark and every police department in the United States of America. *See Kelly v. Johnson*; *Goldman v. Weinberger*; *Procunier v. Martinez* and *Bell v. Wolfish*.

CONCLUSION

For the reasons expressed in this Petition, the City of Newark respectfully requests this Court issue a writ of certiorari to review the United States Court of Appeals for the Third Circuit's decision; reverse that court's determination and vacate the award of costs and lawyer's fees in this matter.

Respectfully submitted,

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DATED AND FILED MARCH 3, 1999

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 97-5542

FRATERNAL ORDER OF POLICE
NEWARK LODGE NO. 12;
FARUQ ABDUL-AZIZ; SHAKOOR MUSTAFA

v.

CITY OF NEWARK; NEWARK POLICE DEPARTMENT;
JOSEPH J. SANTIAGO, NEWARK POLICE DIRECTOR;
THOMAS C. O'REILLY, NEWARK CHIEF OF POLICE,
Appellants

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

(D.C. Civil No. 97-02672)
(District Judge: Honorable John W. Bissell)

Argued: June 25, 1998

Before: GREENBERG, ALITO, and McKEE,
Circuit Judges

(Opinion Filed: March 3, 1999)

Appendix A

* * *

OPINION OF THE COURT

ALITO, *Circuit Judge*:

This appeal presents the question whether the policy of the Newark (N.J.) Police Department regarding the wearing of beards by officers violates the Free Exercise Clause of the First Amendment. Under that policy, which the District Court held to be unconstitutional, exemptions are made for medical reasons (typically because of a skin condition called pseudo folliculitis barbae), but the Department refuses to make exemptions for officers whose religious beliefs prohibit them from shaving their beards. Because the Department makes exemptions from its policy for secular reasons and has not offered any substantial justification for refusing to provide similar treatment for officers who are required to wear beards for religious reasons, we conclude that the Department's policy violates the First Amendment. Accordingly, we affirm the District Court's order permanently enjoining the Department from disciplining two Islamic officers who have refused to shave their beards for religious reasons.

I

Since 1971, male officers in the Newark Police Department have been subject to an internal order that requires them to shave their beards. In relevant part, the order provides:

Appendix A

> Full beards, goatees or other growths of hair below the lower lip, on the chin, or lower jaw bone area are prohibited.

App. at 94 (Special Order from the Chief of Police No. 71-15, p.2 ("Order 71-15")). The order permits officers to wear mustaches and sideburns, *id.*, and it allows exemptions from the "no-beard" rule for undercover officers whose "assignments or duties permit a departure from the requirements." *Id.* at 93. *See* Appellees' Br. at 14; Reply Br. at 9.

Officers Faruq Abdul-Aziz and Shakoor Mustafa are both devout Sunni Muslims who assert that they believe that they are under a religious obligation to grow their beards. *See* App. at 9-10; Supp. App. 3-4. According to the affidavit of an imam, "it is an obligation for men who can grow a beard, to do so" and not to shave. Supp. App. at 3. The affidavit continues:

> . . . The Quran commands the wearing of a beard implicitly. The Sunnah is the detailed explanation of the general injunctions contained in the Quran. The Sunnah says in too many verses to recount [:] "Grow the beard, trim the mustache."
>
> . . . I teach as the Prophet Mohammed taught that the Sunnah must be followed as well as the Quran. This in the unequivocal teaching for the past 1,418 years, by the one billion living Sunni Muslims world wide.

> . . . The refusal by a Sunni Muslim male who can grow a beard, to wear one is a major sin. I teach based upon the way I was taught and it is understood in my faith that the non-wearing of a beard by the male who can, for any reason is as [serious] a sin as eating pork.
>
> . . . This is not a discretionary instruction; it is a commandment, A Sunni Muslim male will not be saved from this major sin because of an instruction of another, even an employer to shave his beard and the penalties will be meted out by Allah.

Supp. App. at 4. The defendants have not disputed the sincerity of the plaintiffs' beliefs.[1]

When Aziz and Mustafa were questioned about their noncompliance with Order 71-15, they informed Department officials that they were growing their beards for religious reasons. *See* Supp. App. at 1 & 5. This explanation was apparently deemed inadequate, and Mustafa received a Preliminary Notice of Disciplinary Action in July 1996 charging him with disobeying an oral command to comply with Order 71-15. App. at 96-97. Aziz received a similar notice in January 1997. *Id.* at 98-99. In both cases, the notices informed the officers that their actions might warrant "removal" from the Department. *Id.* at 96 & 98.

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1. *Cf. Lewis v. Scott*, 910 F.Supp. 282, 287 (E.D. Tex. 1995) (testimony of an Islamic chaplin regarding whether a beard is obligatory).

Appendix A

On January 24, 1997, Chief of Police Thomas C. O'Reilly announced a "Zero Tolerance" policy for officers who were not in compliance with Order 71-15 and had not received "medical clearance" to wear a beard. App. at 95 (Memorandum from the Chief of Police No. 97-30 ("Memo 97-30")). Consistent with this policy, the Department ordered Officers Aziz and Mustafa to appear for disciplinary hearing in May 1997.

Prior to the hearing, Mustafa and Aziz filed a complaint in the District Court requesting permanent injunctive relief on the ground that the Department's enforcement of Order 71-15 would violate their rights under the Free Exercise Clause of the First Amendment.[2] After the defendants filed a motion to dismiss, and the plaintiffs filed a motion for summary judgment, the District Court held a hearing and concluded that the Department's application of Order 71-15 to Mustafa and Aziz would violate their free exercise rights. Accordingly, the District Court permanently enjoined the defendants "from disciplining or otherwise disadvantaging Plaintiffs Aziz and Mustafa for violating Order 71-15 or any other directive which would require them to shave or trim their beards in violation of their religious beliefs." App. at 23.

II

The Free Exercise Clause of the First Amendment, which has been made applicable to the States through the

2. Mustafa and Aziz brought several other claims, all of which were dismissed by the District Court. *See* App. at 15-16. The plaintiffs have not appealed these dismissals.

Fourteenth Amendment, *see Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940), provides that "Congress shall make no law . . . prohibiting the free exercise" of religion. U.S. Const. amend. I. For many years, the Supreme Court appeared to interpret the free exercise clause as requiring the government to make religious exemptions from neutral, generally applicable laws that have the incidental effect of substantially burdening religious conduct. *See Wisconsin v. Yoder*, 406 U.S. 205, 220 (1972) ("[T]here are areas of conduct protected by the Free Exercise Clause of the First Amendment and thus beyond the power of the State to control, even under regulations of general applicability."); *see also Frazee v. Illinois Dep't of Employment Sec.*, 489 U.S. 829, 832-34 (1989); *Thomas v. Review Bd. of Indiana Employment Div.*, 450 U.S. 707, 717 (1981); *Sherbert v. Verner*, 374 U.S. 398, 403-404 (1963). In these cases, the Court required the government to meet "strict scrutiny" when application of a given law or regulation served to impose a substantial burden on religious activity. *See Thomas*, 450 U.S. at 718 ("The state may justify an inroad on religious liberty by showing that it is the least restrictive means of achieving some compelling state interest."); *Yoder*, 406 U.S. at 215 ("[O]nly those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion.").

In 1986, a plurality of the Court raised doubts about the breadth of the Court's "exemption" jurisprudence and proposed a new approach. *See Bowen v. Roy*, 476 U.S. 693, 703-08 (1986) (Burger, CA, joined by Rehnquist and Powell, J.J.). In *Roy*, a mother and father who wished to participate in the Aid

to Families with Dependent Children program objected on religious grounds to the requirement that they furnish their daughter's Social Security number as a condition of receiving benefits. *Id.* at 695. Although the Court's precedent indicated that these circumstances were sufficient to trigger strict scrutiny because the government had "condition[ed] receipt of an important benefit upon conduct proscribed by a religious faith," *Thomas*, 450 U.S. at 717-718, the plurality opinion applied rational basis review. *Roy*, 476 U.S. at 707-08. The opinion explained:

> We conclude . . . that government regulation that indirectly and incidentally calls for a choice between securing a governmental benefit and adherence to religious beliefs is wholly different from governmental action or legislation that criminalizes religiously inspired activity or inescapably compels conduct that some find objectionable for religious reasons. Although the dental of government benefits over religious objection can raise serious Free Exercise problems, these two very different forms of government action not governed by the same constitutional standard.

Id. at 706 (emphasis added). *See also id.* at 704.

In sum, the plurality proposed that the Court continue to apply heightened scrutiny to neutral, generally applicable laws that burden religious activity by affirmatively compelling or prohibiting conduct, but apply rational basis scrutiny to neutral, generally applicable rules governing

benefits programs. However, rather than advocating the overruling of the Court's prior benefits-exemption cases, such as *Sherbert* and *Thomas*, the plurality distinguished those decisions on the ground that they concerned laws that already included "mechanism[s] for individualized exemptions." *Roy*, 476 U.S. at 708. The plurality explained that if "a state creates such a mechanism, its refusal to extend an exemption to an instance of religious hardship suggests a discriminatory intent," and it is "appropriate to require the State to demonstrate a compelling reason for denying the requested exemption." *Id.* Since the statutory framework at issue in *Roy* did not provide for individualized exemptions, the plurality did not believe that the Court's prior benefits decisions were controlling.

The *Roy* plurality's attempt to distinguish the Court's previous decisions and apply rational basis review failed to garner a majority of the Court. *See id.* at 715-16 (Blackmun, J., concurring in part); *id.* at 728-32 (O'Connor, J., joined by Brennan and Marshall, J.J., concurring in part and dissenting in part); *id.* at 733 (White, J., dissenting). In 1990, however, the legal landscape changed dramatically when the Supreme Court handed down its decision in *Employment Div., Dep't of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990). *Smith* concerned two individuals who were denied state unemployment compensation benefits after being fired from their jobs for ingesting peyote, a controlled substance under Oregon law. *Id.* at 874. The individuals challenged the denial of benefits on the ground that they were entitled to religious exemptions since they had ingested peyote for sacramental purposes at a ceremony of the Native American Church. Declining to apply strict scrutiny, the

Court concluded that "the right of free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)." *Smith*, 494 U.S. at 879 (quotations omitted). *See also id.* at 878 (explaining that "if prohibiting the exercise of religion" is "merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not been offended"). Accordingly, the Court held that Oregon could, consistent with the Free Exercise Clause, criminalize religious peyote use and deny unemployment compensation benefits to individuals whose job dismissals resulted from such use. *Id.* at 890.

The *Smith* Court, however, did not overrule its prior free exercise decisions, but rather distinguished them. *See Smith*, 494 U.S. at 881-884.[3] In this case, the plaintiffs contend that their Free Exercise claim is not governed by the generally applicable *Smith* rule but is instead governed by the Court's pre-*Smith* decisions. In this connection, the plaintiffs make three arguments. First, they contend that the *Smith* decision should be limited to cases involving criminal prohibitions. Second, they argue that the *Smith* analysis does not apply to government rules that, like the "no-beard" policy, already make secular exemptions for certain individuals. Finally, they maintain that the *Smith* rule does not bar their exemption claim because they are

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3. *See generally* Note, James M. Oleske, Jr., *Undue Burdens and the Free Exercise of Religion: Reworking a "Jurisprudence of Doubt"*, 85 Geo. L.J. 751 (1997).

relying on both the Free Exercise Clause and the Free Speech Clause. The District Court accepted the plaintiffs' first argument, applied the Court's pre-*Smith* jurisprudence, and concluded that the Free Exercise Clause prohibits the Department from enforcing its "no-beard" policy against Aziz and Mustafa. While we disagree with the District Court's conclusion that *Smith* is limited to the criminal context, we believe that the plaintiffs are entitled to a religious exemption since the Department already makes secular exemptions. As a result, we need not reach the plaintiffs' "hybrid" free speech/free exercise argument.[4] *See generally Smith*, 494 U.S. at 881-882 (distinguishing "hybrid" claims from free exercise claims).

III

A

Aziz and Mustafa first contend that the *Smith* rule applies only to cases involving criminal prohibitions. Since this case concerns a non-criminal prohibition, Aziz and Mustafa argue that the Court's pre-*Smith* decisions govern and heightened scrutiny applies. This position, however, has already been rejected by our court. *See Salvation Army v. Department of Community Affairs of New Jersey*, 919 F.2d 183, 194-96 (3d Cir. 1990). *Salvation Army* involved

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4. We do note, however, that the plaintiffs failed to allege a free speech violation in their complaint, *see* App. at 83-92, and explicitly disavowed such a claim before the District Court. *See* App. at 58 (July 18, 1997 Hearing) (counsel for plaintiffs) ("We can all agree that freedom of expression would not extend to the wearing of beards.").

a claim by The Salvation Army ("TSA") that it was entitled to a religious exemption from the requirements of the New Jersey Rooming and Boarding House Act of 1979, N.J. Stat. Ann. § 55:13B-1 (West 1989), and the regulations promulgated thereunder. *Salvation Army*, 919 F.2d. at 185. Like Aziz and Mustafa, TSA argued that "the Court's holding in *Smith* was limited to free exercise challenges to neutral, generally applicable *criminal statutes*." *Id.* at 194 (emphasis in original). Our response was unequivocal: "We cannot accept this interpretation of Smith." *Id.*

In addition to the analysis provided in *Salvation Army*, *see* 919 F.2d at 194-96, we believe there are two further reasons to conclude that *Smith* is not limited to cases involving criminal statutes. First, under a contrary reading of *Smith*, the Free Exercise Clause would not be implicated when the government prohibits religious conduct through generally applicable laws, *Smith*, 494 U.S. at 878-79, but would be implicated when the government imposes a lesser burden on religion through a generally applicable civil regulation. This counter-intuitive interpretation of the First Amendment is undermined by the very language of the *Smith* opinion:

> [I]f a state has prohibited through its criminal laws certain kinds of religiously motivated conduct without violating the First Amendment, *it certainly follows that it may impose the lesser burden* of denying unemployment compensation benefits to persons who engage in that conduct.

Smith, 494 U.S. at 875 (quotation omitted) (emphasis added). *See also id.* at 898-99 (opinion of O'Connor, J., joined by Brennan, Marshall, and Blackmun, J.J.) ("A neutral criminal law prohibiting conduct that a State may legitimately regulate is, if anything, more burdensome than a neutral civil statute placing legitimate conditions on the award of a state benefit.").

Second, the Supreme Court's most recent characterization of *Smith* supports our holding in *Salvation Army* that *Smith* is not limited to the criminal context. In *City of Boerne v. Flores*, 117 S. Ct. 2157 (1997), the Supreme Court stated:

> *Smith* held that neutral, generally applicable laws may be applied to religious practices even when not supported by a compelling governmental interest.

Id. at 2161. Nowhere in its discussion of *Smith* did the *Flores* Court indicate that the *Smith* decision only applied to generally applicable criminal laws. In fact, the law at issue in *Flores* was a non-criminal landmark ordinance. *See Flores*, 117 S. Ct. at 2160. If the plaintiffs are correct, and *Smith* does not apply to non-criminal provisions, there would have been no need for the *Flores* Court even to discuss *Smith*. However, the *Flores* Court did much more than to discuss *Smith*; it struck down the Religious Freedom Restoration Act of 1993, insofar as it applied to the states, for the very reason that it was inconsistent with *Smith*. *See Flores*, 117 S. Ct. at 2171-72. In light of *Flores*, it is difficult to say that *Smith* has no application to cases involving non-criminal statutes.

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Because this court has already rejected the argument that *Smith* is limited to cases involving criminal statutes, and because that rejection is amply supported by both the *Smith* opinion itself and recent Supreme Court case law, we cannot agree with the plaintiffs and the District Court that *Smith* is distinguishable on the ground that it concerned a criminal statute.

B

Aziz and Mustafa's second argument is that the Department's refusal to make religious exemptions from its no-beard policy should be reviewed under strict scrutiny because the Department makes secular exemptions to its policy. This contention rests on the following passage from *Smith* in which the Court explained why some of its earlier religious exemption cases had applied strict scrutiny:

> The statutory conditions in *Sherbert* and *Thomas* provided that a person was not eligible for unemployment compensation benefits if, 'without good cause,' he had quit work or refused available work. The 'good cause' standard created a mechanism for individualized exemptions. As the plurality pointed out in *Roy*, our decisions in the unemployment cases stand for the proposition that where the State has in place a system of individual exemptions, it may not refuse to extend that system to cases of religious hardship without compelling reason.

Smith, 494 U.S. at 884 (quotations, citations, and alterations omitted).

The Court reiterated this understanding of its religious exemption jurisprudence, and applied it outside the unemployment compensation context, in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 537-38 (1993). In *Lukumi*, the Court reviewed several municipal ordinances regulating the slaughter of animals, one of which prescribed punishments for "[w]hoever . . . unnecessarily . . . kills any animal." *Id.* at 537. The Court explained that this ordinance could not be applied to punish the ritual slaughter of animals by members of the Santeria religion when the ordinance was not applied to secular killings:

> [B]ecause [the ordinance] requires an evaluation of the particular justification for the killing, this ordinance represents a system of individualized governmental assessment of the reasons for the relevant conduct. As we noted in *Smith*, in circumstances in which individualized exemptions from a general requirement are available, the government may not refuse to extend that system to cases of "religious hardship" without compelling reason. Respondent's application of the test of necessity *devalues religious reasons for killing by judging them to be of lesser import than nonreligious reasons. Thus religious practice is being singled out for discriminatory treatment.*

Lukumi, 508 U.S. at 537-38 (emphasis added) (quotations and citations omitted).[5]

Aziz and Mustafa contend that, since the Department provides medical — but not religious — exemptions from its "no-beard" policy,[6] it has unconstitutionally devalued their religious reasons for wearing beards by judging them to be of lesser import than medical reasons. The Department, on the other hand, maintains that its distinction between medical exemptions and religious exemptions does not represent an impermissible value judgment because medical exemptions are made only so as to comply with the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101 (1994). *See* Brief in Support of the Defendants'

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5. *See also Roy*, 476 U.S. at 708 (plurality opinion):

> If a state creates a mechanism [for exemptions], its refusal to extend an exemption to an instance of religious hardship suggests a discriminatory intent. Thus . . . to consider a religiously motivated resignation to be "without good cause" tends to exhibit hostility, not neutrality, towards religion.

6. In their reply brief, the defendants argue for the first time that the District Court "incorrectly decided the City of Newark has a medical exception." Reply Br. at 14. We will not entertain this argument as it conflicts with the defendants' position both in the District Court and in their opening brief to this court. *See* Defendants' Answer ¶ 3; Brief in Support of Defendants' Motion to Dismiss at 11; Appellants' Br. at 11. Moreover, we are at a loss to understand the defendants' new position given that Memo 97-30 clearly provides exemptions from the "Zero Tolerance" policy for those who "have received medical clearance." App. at 95.

Motion to Dismiss at 11. While this argument initially appears persuasive, it ultimately cannot be sustained.

It is true that the ADA requires employers to make "reasonable accommodations" for individuals with disabilities. 42 U.S.C. § 12111(b)(5)(A) (1994). However, Title VII of the Civil Rights Act of 1964 imposes an identical obligation on employers with respect to accommodating religion. 42 U.S.C. § 2000e(j) (1994). This parallel requirement undermines the Department's contention that it provides a medical exception, but not a religious exception, because it believes that "the law may require" a medical exception. Brief in Support of Defendants' Motion to Dismiss at 11. Furthermore, it is noteworthy that the Department has clearly been put on notice of Title VII's religious accommodation requirements. *See* EEOC Determination Letter, Charge No. 171970408 (attached to Plaintiffs' Letter Brief in Response to Defendants' Cross Motion for Summary Judgment); App. at 83 (Plaintiffs' Complaint) (citing Title VII). In light of these circumstances, we cannot accept the Department's position that its differential treatment of medical exemptions and religious exemptions is premised on a good-faith belief that the former may be required by law while the latter are not.

We also reject the argument that, because the medical exemption is not an "individualized exemption," the *Smith/Lukumi* rule does not apply. *See* App. at 19 (Dist. Ct. Op. at 12). While the Supreme Court did speak in terms of "individualized exemptions" in *Smith* and *Lukumi*, it is clear from those decisions that the Court's concern was the

prospect of the government's deciding that secular motivations are more important than religious motivations. If anything, this concern is only further implicated when the government does not merely create a mechanism for individualized exemptions, but instead, actually creates a categorical exemption for individuals with a secular objection but not for individuals with a religious objection. *See generally Lukumi*, 508 U.S. at 542 (1992) ("All laws are selective to some extent, but *categories* of selection are of paramount concern when a law has the incidental effect of burdening religious practice.) (emphasis added). Therefore, we conclude that the Department's decision to provide medical exemptions while refusing religious exemptions is sufficiently suggestive of discriminatory intent so as to trigger heightened scrutiny under *Smith* and *Lukumi*.

Contrary to the Department's contention, our decision to apply heightened scrutiny is entirely consistent with the result in *Smith*. In *Smith*, the Court upheld an Oregon law that prohibited the "knowing or intentional possession of a 'controlled substance' unless the substance has been prescribed by a medical practitioner." *Smith*, 494 U.S. at 874. The Department argues that, since the prescription exception did not prompt the *Smith* Court to apply heightened scrutiny to the Oregon law, we should not apply heightened scrutiny in the instant case based on the Department's allowance of medical exemptions. *See* Appellants' Br. at 8-9. This argument, however, overlooks a critical difference between the prescription exception in the Oregon law and the medical exemption in this case.

Appendix A

The Department's decision to allow officers to wear beards for medical reasons undoubtably undermines the Department's interest in fostering a uniform appearance through its "no-beard" policy. By contrast, the prescription exception to Oregon's drug law does not necessarily undermine Oregon's interest in curbing the unregulated use of dangerous drugs. Rather, the prescription exception is more akin to the Department's undercover exception, which does not undermine the Department's interest in uniformity because undercover officers "obviously are not held out to the public as law enforcement person[nel]." Reply Br. at 9. The prescription exception and the undercover exception do not trigger heightened scrutiny because the Free Exercise Clause does not require the government to apply its laws to activities that it does not have an interest in preventing. However, the medical exemption raises concern because it indicates that the Department has made a value judgment that secular (i.e., medical) motivations for wearing a beard are important enough to overcome its general interest in uniformity but that religious motivations are not. As discussed above, when the government makes a value judgment in favor of secular motivations, but not religious motivations, the government's actions must survive heightened scrutiny.[7]

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7. While *Smith* and *Lukumi* speak in terms of strict scrutiny when discussing the requirements for making distinctions between religious and secular exemptions, *see Smith*, 494 U.S. at 884 requiring a "compelling reason"); *Lukumi*, 508 U.S. at 537 (same), we will assume that an intermediate level of scrutiny applies since this case arose in the public employment context and since the Department's actions cannot survive even that level of scrutiny.

Appendix A

C

The Department has not offered any interest in defense of its policy that is able to withstand any form of heightened scrutiny. The Department contends that it wants to convey the image of a " 'monolithic, highly disciplined force' " and that "[u]niformity [of appearance] not only benefits the men and women that risk their lives on a daily basis, but offers the public a sense of security in having readily identifiable and trusted public servants." Appellant's Brief at 14 (citation omitted). We will address separately all of the interests that we can discern in this passage.

The Department hints that other officers and citizens might have difficulty identifying a bearded officer as a genuine Newark police officer and that this might undermine safety. But while safety is undoubtedly an interest of the greatest importance, the Department's partial no-beard policy is not tailored to serve that interest. Uniformed officers, whether bearded or clean-shaven, should be readily identifiable. Officers who wear plain clothes are not supposed to stand out to the same degree as uniformed officers, and in any event the Department permits such officers to wear beards for medical reasons. The Department does not contend that these medical exemptions pose a serious threat to the safety of the members of the force or to the general public, and there is no apparent reason why permitting officers to wear beards for religious reasons should create any greater difficulties in this regard.

Appendix A

The Department also suggests that permitting officers to wear beards for religious reasons would undermine the force's morale and esprit de corps. However, the Department has provided no legitimate explanation as to why the presence of officers who wear beards for medical reasons does not have this effect but the presence of officers who wear beards for religious reasons would. And the same is true with respect to the Department's suggestion that the presence of officers who wear beards for religious reasons would undermine public confidence in the force. We are at a loss to understand why religious exemptions threaten important city interests but medical exemptions do not. Conceivably, the Department may think that permitting officers to wear beards for religious reasons would present a greater threat to the sense of uniformity that it wishes to foster because the difference that this practice highlights — namely, a difference in religious belief and practice — is not superficial (like the presence of pseudo folliculitis barbae) and thus may cause divisions in the ranks and among the public. (There is no doubt that religious differences have been a cause of dissension throughout much of human history.) But if this is the Department's thinking — and we emphasize that the Department has not spelled out this argument in so many words — what it means is that Sunni Muslim officers who share the plaintiffs' religious beliefs are prohibited from wearing beards precisely for the purpose of obscuring the fact that they hold those beliefs and that they differ in this respect from most of the other members of the force. In other words, if this is the real reason for the distinction that is drawn between medical and religious exemptions, we have before us a policy the very purpose of which is to suppress manifestations of the religious diversity

that the First Amendment safeguards. Before sanctioning such a policy, we would require a far more substantial showing than the Department has made in this case. We thus conclude that the Department's policy cannot survive any degree of heightened scrutiny and thus cannot be sustained.[8]

IV

For the reasons set out above, we affirm the decision of the District Court.

A True Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

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8. We also reject the defendants' argument that the District Court erred in awarding some $12,000 in attorney's fees in favor of the plaintiffs. The defendants argue that this amount was unnecessary because the plaintiffs might have prevailed without federal court litigation had they pursued available administrative remedies. We conclude, however, that the District Court acted well within the proper bounds of its discretion in making the award that it did under the circumstances present here.

APPENDIX B — JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DATED MARCH 3, 1999

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 97-5542

FRATERNAL ORDER OF POLICE NEWARK LODGE NO. 12; FARUQ ABDUL-AZIZ; SHAKOOR MUSTAFA

v.

CITY OF NEWARK; NEWARK POLICE DEPARTMENT; JOSEPH J. SANTIAGO, NEWARK POLICE DIRECTOR; THOMAS C. O'REILLY, NEWARK CHIEF OF POLICE,

Appellants

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

(D.C. Civil No. 97-02672)
(District Judge: Honorable John W. Bissell)

Present: Greenberg, Alito, and McKee, *Circuit Judges*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was argued by counsel on June 25, 1998.

Appendix B

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court entered July 31, 1997, be, and the same is hereby affirmed. Costs taxed against appellants. All of the above in accordance with the opinion of this Court.

ATTEST:

s/ P. Douglas Sisk
Clerk

Dated: March 3, 1999

Cost Taxed In Favor of Appellees' as follows:

Total for Brief	$59.20
Total for Supplemental Appendix	$32.28
Total for Sales Tax	$ 5.49
Total	$96.97

APPENDIX C — OPINION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY WITH EXHIBITS DATED JULY 29, 1997

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil Action No. 97-2672

FRATERNAL ORDER OF POLICE, NEWARK LODGE NO. 12, FARUQ ABDUL-AZIZ AND SHAKOOR MUSTAFA

Plaintiffs,

v.

CITY OF NEWARK, NEWARK POLICE DEPARTMENT, NEWARK POLICE DIRECTOR JOSEPH J. SANTIAGO, AND NEWARK CHIEF OF POLICE THOMAS C. O'REILLY

Defendants.

* * *

OPINION

BISSELL, *District Judge*

This matter comes before the Court on Plaintiffs, motion for summary judgment and Defendants' cross motion to dismiss. This action stems from the efforts of the Newark Police Department to enforce certain grooming restrictions

which prohibit police officers from growing beards. Plaintiffs allege that this restriction, as applied, violates the Free Exercise Clause of the First Amendment of the United States Constitution, Title VII (42 U.S.C. § 2000e), 42 U.S.C. § 1983, 42 U.S.C. § 1981, the Religious Freedom Restoration Act ("RFRA") and the New Jersey Law Against Discrimination ("NJLAD").

This Court has jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1367.

Facts

Plaintiffs Faruq Abdul 'Aziz and Shakoor Mustafa are members of the Newark Police Department. They are also devout observers of the Islamic faith. (Compl. at ¶ III). Specifically, they are "Sunni Muslims" who follow the teachings of both the Holy Quran and the Sunnah. (Adib Aff. at ¶ 9). The Sunnah requires that a man who can grow a beard must do so, and trim his mustache[1]. (*Id.* at ¶¶ 8, 9).

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1. In several passages, the Sunnah expresses:

> Do the opposite of what the Pagans do, cut the mustaches short and leave the beard (as it is) . . . .
>
> Be different from the Mushrikeen, trim your mustache and grow your beards . . . .
>
> Clip your mustaches and grow your beard — differ from the Magians . . . .

(Cont'd)

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The refusal by a Sunni Muslim male who can grow a beard to wear one is a major sin and is tantamount to eating pork. (*Id.* at ¶ 11). The Sunnah allows no discretion in this matter. (*Id.* at ¶ 12).

Plaintiff 'Aziz has been employed by the Newark Police Department since 1989. (Compl. at ¶ VI). Plaintiff Mustafa has been employed by the Defendants since at least 1986. (Compl. at ¶ XI). Mustafa has worn a beard since 1986. (*Id.*). 'Aziz has worn a beard since his graduation from the police academy. (Compl. at ¶ IX).

On March 23, 1971, then Chief of Police Anthony Barres issued Order from the Chief of Police No. 71-15 ("Order 71-15") (Attached hereto as Exhibit A). Order 71-15 provides for the regulation of hair style and facial hair growth of police officers. Relevantly, it provides:

> Full beards, goatees or other growths of hair below the lower lip, on the chin, or lower jaw bone are prohibited.

Id. Mustaches and sideburns are allowed within certain limitations. *Id.*

(Cont'd)

> Shorten your moustaches and let your beards grow, be different from the people of the book. . . .
>
> Ten things are from the Fitrah: Shortening the moustache and growing the beard. . . .

(Compl. at ¶ VIII).

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On January 24, 1997, Defendant Chief of Police Thomas C. O'Reilly issued Memorandum 97-30. (Attached hereto as Exhibit B). It instructed all Bureau Commanders to submit lists of those officers who were not in compliance with the grooming standards. It stated that "Personnel who have received medical clearance shall be documented and updated to ensure that medical clearance is current." (*Id.*). For all others there was "[a] '*ZERO-TOLERANCE*' policy" for noncompliance. (*Id.*).

Plaintiff 'Aziz has been charged with disobeying order 71-15, and has been served with a Preliminary Notice of Disciplinary Action. (Compl. at Exh. C). The notice states that "The following disciplinary action may be taken against ['Aziz]: Removal." (*Id.*). Plaintiff Mustafa has been charged with disobeying the verbal order of Lt. Alfred Pepe to shave, and has also been served with a Preliminary Notice of Disciplinary Action. (Compl. at Exh. D). Mustafa's notice also indicates removal as the potential sanction. (*Id.*).

The hearings have not taken place at this time, partially due to the filing of this Complaint and other filings before the Equal Employment Opportunity Commission. However, Defendants fully intend to prosecute these alleged violations. (*See* Defendants' Brief at 1-2).

Analysis

I. Parties

Plaintiffs purport to bring this action on behalf of themselves and all others similarly situated. The Complaint

defines the relevant class as "All Newark Police Officers of the Islamic faith who will be denied employment because of the discriminatory practices of defendants as described herein." (Compl. at ¶ XVII). They seek certification of this class under Federal Rule of Civil Procedure 23(a) and 23(b)(2). These Rules provide:

> (a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.
>
> (b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:
>
> * * *
>
> (2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole . . .

Fed. R. Civ. P. 23.

The Court finds that the requirements of Rule 23 have not been met, particularly, the numerosity requirement. As was made clear at oral argument, the individuals who have religious conflicts with adherence to Order 71-15 are readily identifiable and their joinder would not be impracticable.

Similarly, the Court also dismisses the Complaint as to the Fraternal Order of Police. While that entity might have standing in some circumstances, it does not in this case. *See, e.g. Lujan v. National Wildlife Federation*, 497 U.S. 871 (1988). The rights which are sought to be asserted belong to the individual officers, and the F.O.P. represents a much broader and more diverse group than those whose rights are at issue here. Furthermore, its status as a union could confine its actions as a party to those available under the National Labor Relations Act.

II. Standards

A. Motion to Dismiss

Fed. R. Civ. P. 12(b)(6) authorizes a court to dismiss a claim on the basis of a dispositive issue of law. *Neitzke v. Williams*, 490 U.S. 319, 326 (1989), citing *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984); *Conley v. Gibson*, 355 U.S. 45-46 (1957). In disposing of a motion to dismiss, the court operates on the assumption that the factual allegations in the complaint or counterclaim are true. *Neitzke*, 490 U.S. at 326-27. A motion to dismiss may be granted if the opposing party would not be entitled to relief under any set of facts consistent with the allegations in the complaint or counterclaim. As the Supreme Court stated in *Neitzke*:

> [n]othing in Rule 12(b)(6) confines its sweep to claims of law which are obviously insupportable. On the contrary, if as a matter of law "it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations," *Hishon, supra* at 73, 104 S.Ct. 2229, a claim must be dismissed, without regard to whether it is based on an outlandish legal theory or on a close but ultimately unavailing one. What Rule 12(b)(6) does not countenance are dismissals based on a judge's disbelief of a complaint's factual allegations.

Id. at 327.

B. Motion for Summary Judgment

Federal Rule of Civil Procedure 56(c) provides that summary judgment should be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. Pro. 56(c); *see also Chipollini v. Spencer Gifts, Inc.*, 814 F.2d 893, 896 (3d Cir.) (*en banc*), *cert. dismissed*, 483 U.S. 1052 (1987). In deciding a motion for summary judgment, a court must view the facts in the light most favorable to the nonmoving party and must resolve any reasonable doubt as to the existence of a genuine issue of fact against the moving party. *Continental Insurance Co. v. Bodie*, 682 F. 2d 436, 438 (3d Cir. 1982). The moving party has the burden of establishing that there exists no

genuine issue of material fact. *See Celotex Corp. v. Catrett*, 477 U.S. 317 (1986).

The Supreme Court has stated that, in applying the criteria for granting summary judgment,

> the judge must ask . . . not whether . . . the evidence unmistakably favors one side or the other but whether a fair-minded jury could return a verdict for the [nonmoving party] on the evidence presented. The mere existence of a scintilla of evidence in support of the [non-movant's] position will be insufficient; there must be evidence on which the jury could reasonably find for the [nonmoving party]. The judge's inquiry, therefore, unavoidably asks whether reasonable jurors could find by a preponderance of the evidence that the [non-movant] is entitled to a verdict. . . .

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252 (1986). A fact is "material" only if it will affect the outcome of a lawsuit under the applicable law, and a dispute over a material fact is "genuine" if the evidence is such that a reasonable fact finder could return a verdict for the nonmoving party. *Id.*

In order to survive a motion for summary judgment, a plaintiff must present "more than a mere scintilla of evidence" in his favor. He "cannot simply reallege factually unsupported allegations contained in his pleadings." *Anderson v. Liberty Lobby*, 477 U.S. 242, 249, 325 (1986);

see also Maguire v. Hughes Aircraft Corp., 912 F.2d 67, 72 (3d Cir. 1990). Only evidence that would be admissible at trial may be used to test a summary judgment motion. *Jordan v. Fox, Rothschild, O'Brien & Frankel*, 20 F.3d 1250, 1261 (3d Cir. 1994). Evidence with a deficient foundation must be excluded from consideration. *Williams v. Borough of West Chester, PA*, 891 F.2d 458, 466 (3d Cir. 1989); *see also Trap Rock Indus., Inc. v. Local 825, Int'l Union of Operating Eng'rs*, 982 F.2d 884, 890-91 (3d Cir. 1992).

III. Free Exercise Clause

Plaintiffs allege that the Defendants' actions are violative of the Free Exercise Clause of the First Amendment of the U.S. Constitution[2].

> The Free Exercise Clause of the First Amendment, which has been made applicable to the States by incorporation into the Fourteenth Amendment, *see Cantwell v. Connecticut*, 310 U.S. 296, 303, 60 S.Ct. 900, 903, 84 L.Ed. 1213 (1940), provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . ." U.S. Const., Amdt. 1 (emphasis added.) The free exercise of religion means, first and foremost, the right to believe and profess whatever religious doctrine one desires. Thus, the First

2. More specifically, that § 1983 has been violated by the state action which infringes the Plaintiffs' First Amendment rights.

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Amendment obviously excludes all "governmental regulation of religious beliefs as such." *Sherbert v. Verner*, supra, 374 U.S., at 402, 83 S.Ct., at 1793. The government may not compel affirmation of religious belief, *see Torcaso v. Watkins*, 367 U.S. 488, 81 S.Ct. 1680, 6 L.Ed.2d 982 (1961), punish the expression of religious doctrines it believes to be false, *United States v. Ballard*, 322 U.S. 78, 86-88, 64 S.Ct. 882, 886-87, 88 L.Ed. 1148 (1944), impose special disabilities on the basis of religious views or religious status, *see McDaniel v. Paty*, 435 U.S. 618, 98 S.Ct. 1322, 55 L.Ed.2d 593 (1978); *Fowler v. Rhode Island*, 345 U.S. 67, 69, 73 S.Ct. 526, 527, 97 L.Ed. 828 (1953); *cf. Larson v. Valente*, 456 U.S. 228, 245, 102 S.Ct. 1673, 1683-84, 72 L.Ed.2d 33 (1982), or lend its power to one or the other side in controversies over religious authority or dogma, *see Presbyterian Church in U.S. v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440, 445 452, 89 S.Ct. 601, 604-608, 21 L.Ed.2d 658 (1969); *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94, 95-119, 73 S.Ct. 143, 143-56, 97 L.Ed. 120 (1952); *Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 708-725, 96 S.Ct. 2372, 2380-2388, 49 L.Ed.2d 151

Employment Division, Department of Human Resources of Oregon v. Smith, 494 U.S. 872, 876-77 (1990).

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The Court must first determine what standard of review is to be applied to the Defendants' actions and policies[3].

The Supreme Court confronted a somewhat similar situation in *Goldman v. Weinberger*, 475 U.S. 503 (1986). The plaintiff in *Goldman* was a clinical psychologist enlisted in the United States Air Force, who was also an Orthodox Jew and ordained rabbi. *Goldman*, 475 U.S. at 504. Goldman wore a yarmulke while in uniform, which violated an Air Force regulation prohibiting the wearing of headgear indoors. *Id.* at 505. Goldman challenged the regulation as violative of the Free Exercise Clause.

In upholding the regulation, the Supreme Court relied predominantly on the special status of the military.

> 'the military is, by necessity, a specialized society separate from civilian society.' '[T]he military must insist upon a respect for duty and a discipline without counterpart in civilian life,' in order to prepare for and perform its vital role. Our review of military regulations challenged on First Amendment grounds is far more deferential than constitutional review of similar laws or regulations designed for civilian society. The

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3. Plaintiffs initially argued that this case was governed by the standard of the Religious Freedom Restoration Act of 1993 ("RFRA"), 42 U.S.C. § 2000bb et seq. However, the Supreme Court has invalidated that statute with its recent decision in *City of Boerne v. Flores*, 1997 WL 345322 (June 25, 1997). Therefore, RFRA no longer has any bearing on this Court's analysis, and any claim based upon that statute is dismissed.

> military need not encourage debate or tolerate protest to the extent that such tolerance is required of the civilian state by the First Amendment; to accomplish its mission the military must foster instinctive obedience, unity, commitment, and esprit de corps. The essence of military service "is the subordination of the desires and interests of the individual to the needs of the service."

Id. at 506 (citations omitted). Therefore, the Court declined to apply either the test of *Sherbert v. Verner*,[4] 374 U.S. 398, 403 (1963), or *Wisconsin v. Yoder*,[5] 406 U.S. 205 (1972).

In *Smith*, the Supreme Court was confronted with the application of Oregon's drug laws to the sacramental use of peyote[6]. *Smith* 494 U.S. at 874. The Court again declined

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4. The *Sherbert* test is "whether some compelling state interest . . . justifies the substantial infringement of appellant's First Amendment right." *Sherbert*, 374 U.S. at 406.

5. *Yoder* requires a showing that "there is a state interest of sufficient magnitude to override the interest claiming protection under the Free Exercise Clause." *Yoder*, 406 U.S. at 214.

6. While Smith involved the denial of unemployment benefits, they were denied as a result of "misconduct" which included illegal activities. Therefore, the question before the Court was not strictly the denial of unemployment benefits on the basis of religious practices (*see, e.g. Sherbert*, supra), but "whether the Free Exercise Clause of the First Amendment permits the State of Oregon to include religiously inspired peyote use within the reach of its general criminal prohibition on use of that drug. . . ." *Smith* 494 U.S. at 874.

to apply the compelling state interest standard of *Sherbert*. *Id.* at 882-89. Instead the Court held that "if prohibiting the exercise of religion . . . is not the object of the [statute,] but merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not been offended." *Smith*, 494 U.S. at 878.

Both *Goldman* and *Smith*, however, must be read in the context of the facts which they presented. The military regulation in *Goldman* was afforded deference that a civilian rule, such as that presented here, would not be. *Goldman*, 475 U.S. at 506, ("Our review of military regulations challenged on First Amendment grounds is far more deferential than constitutional review of similar laws or regulations designed for civilian society"). In *Smith*, the Court found it "*critical*" that "the conduct at issue . . . was . . . prohibited by *law*." *Smith*, 494 U.S. at 876 (emphasis added). In the present case, we are not confronted with either a military or legislative determination which must be afforded similar deference. Order 71-15 is merely a management directive of an employer, and carries no greater significance because that employer is a police department.

However, *Smith* does appear to mark a departure from the compelling interest standard of *Sherbert* outside the unemployment compensation context. *Smith*, 494 U.S. at 883-84. Although there is an exemption for medical reasons[7]

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7. Several officers suffer from pseudofolliculitis barbae "PFB"). "This condition is caused by sharp tips of recently shaved facial hairs penetrating the skin and causing an inflammatory reaction. The disease occurs in persons with curly or kinky hair

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to Order 71-15, it is a categorical exemption rather than the "individual exemptions" which characterized *Sherbert* and its progeny. *Smith*, 494 U.S. at 884; *Cf. E.E.O.C. v. United Parcel Service*, 1993 WL 487356, *2 (N.D. Ill. Nov. 22, 1993) (PFB exemption not facially discriminatory).

The more appropriate test in evaluating an internal regulation such as Order 71-15, is the balancing test of *Yoder*, whether the governmental interest is "of sufficient magnitude to override the interest claiming protection under the Free Exercise Clause." *Yoder*, 406 U.S. at 214; *accord Marshall v. District of Columbia*, 392 F. Supp. 1012, 1013 (D.D.C. 1975), *aff'd* 559 F.2d 726 (D.C. Cir. 1977) (*Yoder* is the appropriate test in evaluating a police officer's religious challenge to a grooming regulation).

Marshall dealt with a nearly identical situation, and should therefore be discussed in this Court's analysis. The plaintiff in *Marshall* was a police officer in the District of

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(Cont'd)
follicles. After shaving, the curved hair follicles cause the already curly hair to curve back into contact with the skin surface, pierce and reenter the skin, causing a pseudofollicle.

The inflammatory reaction may result in papules, pustules or abscesses. An individual with PFB may induce remission by growing a beard. Remission in such cases is nearly total and complete. An individual can, however, redevelop the disease by resuming shaving . . . PFB, is a skin disorder that overwhelmingly affects black men who shave." *Equal Employment Opportunity Commission v. Greyhound Lines, Inc.*, 494 F. Supp. 481, 483 (E.D. Pa. 1979), *rev'd on other grounds* 635 F.2d 188 (1980).

Columbia Police Department who was disciplined for violating the department's grooming regulations when he refused to shave his beard or cut his hair for religious reasons[8]. While it enunciated the same test which this Court has adopted, the *Marshall* court turned it on its end. The inquiry ultimately became "whether the defendants should be compelled to accommodate plaintiff's religious conviction." 392 F. Supp. at 1015. Although the court made no effort to define Marshall's interests, it accepted without reservation the police department's contention that any deviation from the regulation would "wholly undermine[ ]" its purpose. *Id.* at 1016. This Court disagrees with that limited analysis.

Furthermore, by providing a medical exemption, Defendants own actions belie any similar argument that Order 71-15 must remain inviolate for the police department to function. Plaintiffs have presented evidence that shows the strength of their interest in being able to grow beards. Order 71-15 "sets up an . . . absolute bar to the fulfillment of a religious duty." *Goldman v. Weinberger*, 475 U.S. 503, 514 (1986) (Brennan, J. dissenting).

In support of their position, the Defendants present a tautological argument, that uniformity is necessary to fulfill "the City's compelling need for uniformity." (Defendants' Brief at 8). However, uniformity is the *means* which they have chosen to create a disciplined and effective police force, it is not a state interest standing alone. The litany of

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8. The court makes no reference as to what those "religious reasons" were.

potential terrors which the Defendants describe: loss of public confidence; having to determine each officer's religion; officers using drugs; and rebellion, are not a foreseeable and proximate result of allowing some officers to wear beards. Instead, uniformity must be viewed as an effective mechanism to express identity, instill public confidence, and create esprit de corps. Defendants have offered no support for their prognostications that unless the zero-tolerance position is adhered to, these objectives cannot be reached[9]. To the contrary, the presence of visibly devout Muslim officers could actually aid the department in demonstrating to the public "that a police officer represents justice, fairness and help to *all*," including Muslim members of the community. (Defendants' Brief at 7).

Defendants' present willingness to provide medical exemptions also undermines their zero-tolerance stance towards religious exemptions.

> In light of the high value accorded First Amendment rights in our system of law, defendants' willingness to agree to the

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9. While the Court recognizes that Defendants' motion is a motion to dismiss, their brief contains unsupported factual assertions in this regard. *Accord Sharif v. City of Chicago*, 530 F. Supp. 667, 670 (N.D. Ill. 1982) ("At this Court's hearing and during oral argument, counsel for the defendants stated (although no proof was introduced) that the Department's ban on beards is based on its interests in uniformity of appearance, esprit de corps and discipline. This Court will not take judicial notice of those reasons, as courts often effectively do in determining whether there is a rational basis for legislation. . . ."

> non-enforcement of the prohibition of beards against a large number of police officers for medical reasons precludes defendants from asserting that they have a compelling governmental interest in banning Sharif's growth of a minimal beard for bona fide religious reasons. All the asserted interests referred to in this paragraph are impaired just as much (or just as little) by permitting a beard for one reason as for another.

Sharif v. City of Chicago, 530 F. Supp. 667, 670 (N.D. Ill. 1982).

Defendants have not shown the existence of a state interest which is sufficient to override that of the Plaintiffs' to practice their religion. Order 71-15, insofar as it requires these Muslim officers to shave, is unconstitutional and a violation of § 1983.

IV. Other Claims

To the extent that plaintiffs have stated a claim under Title VII, 42 U.S.C. § 2000e, or under the New Jersey Law Against Discrimination, N.J.S.A. 10:5-1 *et seq.*, those claims are dismissed without prejudice. The individual plaintiffs have yet to exhaust the administrative remedies available under those statutes.

Also dismissed without prejudice, are any claims which may exist as to the treatment of officers with pseudofolliculitis barbae. Those claims do not implicate the Free Exercise Clause under § 1983.

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V. Relief

Plaintiffs have not sought compensatory damages, and, therefore, they will not be awarded. Permanent injunctive relief has been requested and is appropriate. The Defendants, and any person acting in concert with them, shall be enjoined from disciplining or otherwise disadvantaging Plaintiffs 'Aziz and Mustafa for violating Order 71-15 or any other directive which would require them to shave or trim their beards in violation of their religious beliefs. The Court declines to maintain continuing jurisdiction over this action beyond that required by law.

Plaintiffs have also sought costs, disbursements, and attorney's fees. The judgment in favor of the Plaintiffs will be entered with taxable costs which they may pursue under Local Civil Rule 54.1. Any application for disbursements and or attorney's fees (complying with Local Civil Rule 54.2) must be made by way of motion on notice filed under Local Civil Rule 7.1(c) by August 28, 1997. No alternative relief is deemed necessary or appropriate.

Conclusion

For the foregoing reasons Defendants' motion to dismiss is granted in part and denied in part. The motion of the individual Plaintiffs, Abdul 'Aziz and Mustafa, for summary judgment is granted as to their claims based upon the First Amendment and 42 U.S.C. § 1983. Plaintiffs, counsel is requested to prepare and submit an Order, pursuant to Local Civil Rule 58.1(b), reflecting the decisions expressed in this Opinion.

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s/ John W. Bissell
JOHN W. BISSELL
United States District Judge

DATED: July, 29 1997.

Appendix C

EXHIBIT A

POLICE DEPARTMENT
NEWARK, NEW JERSEY

PUB 3-1

March 23, 1971

SPECIAL ORDER FROM THE CHIEF OF POLICE
NO. 71-15

TO: ALL COMMANDS

FROM: CHIEF OF POLICE

SUBJECT: STANDARDS OF APPEARANCE —
HAIR STYLE — FACIAL HAIR GROWTHS

PURPOSE

The purpose of this order is to set standards of appearance for hair styles and facial hair growths worn by Police officers. The tolerances set forth represent a reconciliation between the current acceptance of fuller and longer male hair styling and the need for establishing clearly defined limits within which our Department can maintain its uniformed identity.

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REQUIREMENT

The standards as defined are a compilation of recommendations made by Divisional Commanders after consultation with subordinates at all functional levels. The tenets of this order are binding on all Police Officers except when their assignments or duties permit a departure from the requirements. However, any departure must be approved by the Divisional Commander.

STANDARDS

Effective this dated, all male Police Officers shall regulate their hair style and facial hair growths to conform with the standards for on duty appearance as listed in this section.

a. *Hair*

(1) The style shall be of medium length and fullness.

(2) The duck tail length is prohibited.

(3) Bushy hair protruding from the sides or back of the head, when a hat is worn, is prohibited.

(4) A neat pattern on the rear of the neck shall be maintained. The growth must be neatly trimmed near the collar line and shall not extend over a shirt or coat collar.

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b. *Sideburns*

(1) The length shall not extend beyond the tip of the ear lobe.

(2) The width shall not extend 1¼-inch at the broadest point.

(3) The growth shall not be more than ¼-inch in depth.

c. *Mustache*

(1) The pattern shall be neatly trimmed.

(2) The extent of growth shall be limited to ½-inch below the line of the corner of the mouth.

(3) The thickness shall be ½-inch in depth and not appear bushy.

(4) The ends may not be waxed or twisted.

d. *Full Beards - Goatees*

Full beards, goatees or other growths of hair below the lower lip, on the chin, or lower jaw bone area are prohibited.

e. *Clean Shaven*

Except for the areas of facial growth permitted by this order, all members shall be clean shaven.

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RULES AND REGULATIONS

This order supplements the Rules and Regulations concerned with members' personal appearance. Any conflict shall be resolved in favor of the standards set by this order.

s/ Anthony Barres
ANTHONY BARRES
CHIEF OF POLICE

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EXHIBIT B

MEMORANDUM FROM THE CHIEF OF POLICE
NEWARK POLICE DEPARTMENT

MEMO NO: 97-30 FILE RE: SWN 25

ALL COMMANDS DATE: JANUARY 24, 1997

FROM: THOMAS C. O'REILLY, CHIEF OF POLICE

SUBJECT: GROOMING — APPEARANCE
COMPLIANCE WITH DEPARTMENT
POLICY — RULES & REGULATIONS

1) Bureau Commanders are to submit a list of personnel who are in non-compliance with grooming standards set by the department.

2) Personnel who have received medical clearance shall be documented and updated to ensure that medical clearance is current.

3) A *"ZERO-TOLERANCE"* policy will be adhered to for those in non-compliance.

4) All department supervisors are reminded as to their roles and responsibilities in ensuring that all rules and regulations concerning dress and grooming are adhered to. Violations of these rules and regulations shall be dealt with accordingly. In all cases of violations, written documentation must be maintained in order to provide progressive discipline.

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5) Inspectional Services will be monitoring compliance.

6) This order shall take effect immediately.

7) A signed copy of this directive indicating receipt and acknowledgement shall be returned to this office on or before Monday, February 3, 1997.

s/ Thomas C. O'Reilly
THOMAS C. O'REILLY
Chief of Police

APPENDIX D — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY DATED AUGUST 20, 1997, FILED AUGUST 22, 1997 AND ENTERED AUGUST 26, 1997

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LL204330

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil Action No: 97-2672

FRATERNAL ORDER OF POLICE, NEWARK LODGE NO. 12, FARUQ ABDUL-AZIZ, AND SHAKOOR MUSTAFA,

Plaintiffs,

vs.

CITY OF NEWARK, NEWARK POLICE DEPARTMENT, NEWARK POLICE DIRECTOR JOSEPH J. SANTIAGO, AND NEWARK CHIEF OF POLICE THOMAS C. O'REILLY,

Defendants.

ORDER

Appendix D

THIS MATTER being brought to the Court by Plaintiffs' counsel, Robert R. Cannan, Esq. by motion for Summary Judgment, and Defendants' counsel by Darryl M. Saunders, Esq. by cross motion to dismiss, and oral arguments having been heard on July 28, 1997, and it appearing therefrom the following:

Plaintiffs Aziz and Mustafa are police officers of the defendant City of Newark. They are both Muslims who wear beards in the practice of their religion. Defendants have sought to require plaintiffs to shave their beards or alternatively face discipline pursuant to Order 71-15 which sets forth a grooming standard. Order 71-15, insofar as it requires these Muslim officers to shave, is unconstitutional and a violation of the First Amendment and 42 U.S.C. § 1983.

It is on this ___ day of August, 1997, Ordered as follows:

1. The defendants, and any person acting in concert with them, shall be enjoined from disciplining or otherwise disadvantaging Plaintiffs Aziz and Mustafa for violating Order 71-15 or any other directive which would require them to shave or trim their beards in violation of their religious beliefs.

2. Plaintiffs' request to be certified as a class under Federal Rule of Civil Procedure 23(a) and 23(b)(2) is hereby denied.

3. Plaintiffs' Complaint as to the Fraternal Order of Police, Newark Lodge No. 12 is hereby dismissed.

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4. Any claims brought by Plaintiff under the Religious Freedom Restoration Act of 1993 are dismissed.

5. Plaintiffs' claim under Title VII or under the New Jersey Law Against Discrimination, are dismissed without prejudice.

6. Any and all claims which may exist as to the treatment of officers with pseudo folliculitis barbae, are dismissed without prejudice.

7. The Court declines to maintain continuing jurisdiction over this action beyond that required by law.

8. Judgment in favor of the Plaintiffs will be enforced with taxable costs which they may pursue under Local Civil Rule 54.1.

9. Any application for disbursements and or attorney's fees must be made by way of motion on notice filed under Local Civil Rule 7.1(c) by August 28, 1997.

10. No alternative relief is deemed necessary or appropriate.

11. A copy of this Order be served upon the defendants through the Corporation Counsel of the City of Newark within 5 days of the date hereof.

s/ John W. Bissel
JOHN W. BISSEL
United States District Judge

Dated: August 20, 1997

Supreme Court, U.S.
FILED
JUL 1 1999
CLERK

No. 98-1919

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

CITY OF NEWARK; NEWARK POLICE DEPARTMENT; JOSEPH J. SANTIAGO, NEWARK POLICE DIRECTOR; THOMAS C. O'REILLY, NEWARK POLICE CHIEF OF POLICE,

Petitioners,

v.

FRATERNAL ORDER OF POLICE NEWARK LODGE NO. 12; FARUQ ABDUL-AZIZ; SHAKOOR MUSTAFA,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF OF RESPONDENTS FARUQ ABDUL-AZIZ AND SHAKOOR MUSTAFA IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a city that exempts from its grooming standards police officers with medical reasons for not shaving, but refuses to exempt officers who have religious reasons for not shaving, violates the Free Exercise Clause of the United States Constitution when it fails to offer any valid justification for its discrimination against officers with religious reasons?

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

No. 98-1919

CITY OF NEWARK; NEWARK POLICE DEPARTMENT; JOSEPH J. SANTIAGO, NEWARK POLICE DIRECTOR; THOMAS C. O'REILLY, NEWARK POLICE CHIEF OF POLICE,

Petitioners,

v.

FRATERNAL ORDER OF POLICE NEWARK LODGE NO. 12; FARUQ ABDUL-AZIZ; SHAKOOR MUSTAFA,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF OF RESPONDENTS FARUQ ABDUL-AZIZ AND SHAKOOR MUSTAFA IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

Respondents Faruq Abdul-Aziz, and Shakoor Mustafa, plaintiffs-appellees below, respectfully submit this Brief in Opposition to the Petition for a Writ of Certiorari filed by petitioners City of Newark, *et al.*, Defendants-Appellants below.*

*Petitioners have included the Fraternal Order of Police, Newark Lodge No. 12 ("F.O.P.") in the caption to their petition and have styled

(continued...)

COUNTERSTATEMENT OF THE CASE

Neither in their Statement of the Case, nor anywhere else in their Petition for a Writ of Certiorari, do Petitioners directly address the central holding of the Court of Appeals: that Newark's grooming policy is not a neutral and generally applicable law within the meaning of *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990). Indeed, nowhere in their Petition do they even *cite*–much less discuss–the precedent of this Court on which the Third Circuit based its decision, *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993). Respondents therefore believe that it is necessary to provide this Court with a detailed Counterstatement of the Case.

Since 1971 the Newark Police Department (the "Department") has had on its books an internal order requiring employees to shave their beards. Pet. App. at 2a. The order permits mustaches and sideburns, and allows officers to wear beards when their undercover assignments or duties permit. *Id.* at 3a. Enforcement prior to 1997 was spotty. Respondents Faruq Abdul-Aziz and Shakoor Mustafa are devout Sunni Muslims who have a religious obligation to grow their beards. *Id.* at 25a-26a & n.1.[1] Respondents have

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*(...continued)
the case with F.O.P. as the lead respondent. We have therefore used that caption here. However, the District Court dismissed the F.O.P. from the case for lack of standing, Pet. App. at 29a, and the F.O.P. did not appeal this decision. The F.O.P. is, accordingly, not a party to the case in this Court.

[1] The Sunnah states "Do the opposite of what the Pagans do, cut the mustaches short and leave the beard (as it is) . . . . Shorten your
(continued...)

worn beards while serving on the force for at least ten years. App. at 26a. Mustafa has worn his since 1986, and Aziz, who joined the force in 1989, has worn a beard ever since his graduation from the police academy. Pet. App. at 26a. Nevertheless, after the two officers had informed Department officials that they were wearing their beards for religious reasons, Pet. App. at 4a, Mustafa and Aziz received Preliminary Notices of Disciplinary Action under the no-beards order in July 1996 and January 1997, respectively. Pet. App. at 26a.

On January 24, 1997, the Chief of Police issued an order declaring what he termed a "zero tolerance" policy for officers who were not in compliance with the 1971 grooming order. Pet. App. at 47a. This so-called zero-tolerance order, however, explicitly exempted officers with "medical clearance" to grow a beard. Pet. App. at 47a; Pet. App. at 15a & n.6. These officers with medical clearance typically have a skin condition known as pseudofolliculitis barbae ("PFB"), a condition which is caused when men prone to the condition shave. Pet. App. 36a-37a & n.7; Pet. App. at 2a. It is treated by growing a beard. Pet. App. at 37a n.7. Respondents Aziz and Mustafa, who had religious reasons for not shaving, were ordered to appear for disciplinary hearings in May 1997. Pet. App. at 5a.

Before the hearing, Respondents filed a complaint in the United States District Court for the District of New Jersey requesting permanent injunctive relief on the ground, *inter alia*, that enforcement of the order violated their rights under

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[1](...continued)
moustaches and let your beards grow, be different from the people of the book . . . ." Pet. App. at 25a-26a n.1. These passages are mandatory: "The refusal by a Sunni Muslim male who can grow a beard to wear one is a major sin and is tantamount to eating pork." Pet. App. at 26a.

the Free Exercise Clause of the First Amendment. The District Court granted Respondents summary judgment on that claim. Pet. App. at 41a.

A unanimous panel of the Third Circuit affirmed. 170 F.3d 359 (3d Cir. 1999). Judge Samuel Alito, writing for the court, held that the grooming policy discriminated against the Respondents in violation of their free exercise rights. The Court of Appeals recognized that this Court in *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990), held that "the right of free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)." *Id.* at 879 (quotations omitted). But *Smith*, the Court of Appeals emphasized, also held that a different rule applies to laws that are not neutral and generally applicable: "[W]here the State has in place a system of individual exemptions, it may not refuse to extend that system to cases of religious hardship without compelling reason." Pet. App. at 13a (quoting *Smith*, 494 U.S. at 884).

The Court of Appeals then turned to this Court's decision in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993). The law at issue there had prohibited the killing of animals for religious reasons, but had permitted it when undertaken for various secular ones, a distinction which "devalues religious reasons for killing by judging them to be of lesser import than nonreligious reasons. Thus, religious practice is being singled out for discriminatory treatment." *Id.* at 537-38. This Court explained that since the law at issue in *Hialeah* "require[d] an evaluation of the particular justification for the killing, this ordinance represents a system of individualized governmental assessment of the

reasons for the relevant conduct." *Id.* at 537 (quotations omitted). Where such exemptions exist, the government "may not refuse to extend that system to cases of 'religious hardship' without compelling reasons." *Id.* (quoting *Smith*, 494 U.S. at 884 (quoting *Bowen v. Roy*, 476 U.S. 693, 708 (1986))).

The Third Circuit determined that the Newark Police Department had engaged in just such a forbidden judgment when it determined that an officer's religious reasons for not shaving are of lesser import than medical reasons.[2] Judge Alito wrote that "the Court's concern [in *Smith* and *Hialeah*] was the prospect of the government's deciding that secular motivations are more important than religious motivations." Pet. App. at 16a-17a. Citing to this Court's insistence that "*categories of selection* are of paramount concern when a law has the incidental effect of burdening religious practice," *Hialeah*, 508 U.S. at 542 (emphasis added), the Court of

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[2]In their reply brief below, the Petitioners made a belated attempt to deny the existence of a medical exemption. Judge Alito was sharply critical of that attempt in his opinion for the Court:

> In their reply brief, the defendants argue for the first time that the District Court "incorrectly decided the City of Newark has a medical exception." Reply Br. at 14. We will not entertain this argument as it conflicts with the defendants' position both in the District Court and in their opening brief to this court. *See* Defendants' Answer ¶ 3; Brief in Support of Defendants' Motion to Dismiss at 11; Appellants' Br. at 11. Moreover, we are at a loss to understand the defendants' new position given that Memo 97-30 clearly provides exemptions from the "Zero Tolerance" policy for those who "have received medical clearance."

Pet. App. at 15a n.6.

Appeals found Newark's categories of selection to be wanting. The Free Exercise Clause is even "further implicated," Judge Alito wrote, "when the government does not merely create a mechanism for individualized exemptions, but instead, actually creates a *categorical* exemption for individuals with a secular objection but not for individuals with a religious objection," Pet. App. at 17a (emphasis added).[3] Therefore, the Court of Appeals concluded, the Department's decision to provide exemptions for medical reasons while refusing to do so for religious reasons "trigger[ed] heightened scrutiny under *Smith* and *Lukumi*." *Id.*

The Court of Appeals then found that Petitioners had advanced no interest sufficient to withstand any level of heightened scrutiny. Pet. App. at 21a. Petitioners' only arguments were that they wanted to convey the image of a "monolithic, highly disciplined force" with a "uniformity of appearance," Pet. App. at 19a, and that permitting beards for religious reasons would undermine the Department's "morale and esprit de corps," Pet. App. at 20a, public confidence in

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[3]Petitioners argued below that they only created the medical exemption to comply with the "reasonable accommodation" provisions of the Americans with Disabilities Act, 42 U.S.C. § 12111(b)(5)(A) (1994), saying that "the law may require" a medical exemption to their grooming policy. Pet. App. at 16a. However, the Court of Appeals noted that Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e(j), places on employers the same "reasonable accommodation" requirement with regard to religion. The court further noted that Petitioners had been put on notice concerning the religious accommodation requirements, but had elected only to accommodate the medical obstacles and not the religious ones. Pet. App. at 16a. The court concluded: "In light of these circumstances, we cannot accept the Department's position that its differential treatment of medical exemptions and religious exemptions is premised on a good-faith belief that the former may be required by law while the latter are not." *Id.*

the force, *id.*, and the ability of the public to identify officers. Pet. App. at 19a. To be sure, these are very serious state interests, as the Court of Appeals noted. Pet. App. at 19a-20a. Petitioners could not explain, however, why "the presence of officers who wear beards for medical reasons does not [undermine these interests] but the presence of officers who wear beards for religious reasons would." *Id.* at 20a. The Court of Appeals was thus "at a loss to understand why religious exemptions threaten important city interests but medical exemptions do not," and concluded that the Department's policy violated the First Amendment. *Id.* at 20a-21a.

Petitioners did not seek rehearing or rehearing *en banc*, but elected instead to come directly to this Court.

REASONS FOR DENYING THE WRIT

Petitioners strain to identify assorted conflicts between the Court of Appeals' decision and a variety of other cases. None of these alleged divergences withstands scrutiny. None, certainly, requires this Court's attention.

I. THERE IS NO SPLIT IN THE LOWER COURTS.

A. There Is No Intracircuit Conflict Between this Case and *Adams v. Commissioner*.

Petitioners begin by announcing that the Court of Appeals' decision is "in direct contradiction" with a tax case also decided by the Third Circuit, *Adams v. Commissioner*, 170 F.3d 173 (3d Cir. Mar. 4, 1999). Pet. at 8. "Remarkably," Petitioners report, *Adams* was handed down by the Third Circuit the day after that same Court handed down its decision in this case. *Id.* That, of course, is

remarkable principally because it demonstrates that Petitioners had ample time to seek rehearing *en banc* if they thought there was a conflict between the two decisions. Instead, Petitioners chose, for reasons they do not reveal, to bypass that procedure and invite this Court to sort out the two opinions.

There is, in any event, no conflict between the two cases. *Adams*, Petitioner explains, involved a "devout Quacker" [sic] who refused to pay taxes to support the military. Pet. at 8. *Adams*, at bottom, is merely a reaffirmation of the settled holding that conscientious objectors must still pay taxes. *United States v. Lee*, 455 U.S. 252, 257 (1982). There is thus no intra-circuit conflict at all, much less one that merits this Court's review.

B. There Is No Conflict Between this Case and the Assorted Other Federal Cases Petitioners Cite.

Next, Petitioners argue that the present case is "inconsistent" with decisions of this "Court, other Third Circuit decisions and various other circuit courts." Pet. at 13. The reference to this Court is apparently to *Kelley v. Johnson*, 425 U.S. 238 (1976), which denied a challenge to grooming regulations that had been brought not on religious grounds, but on the ground that they violated the plaintiff's asserted rights to free expression, equal protection, and "personal liberty" under a substantive due process theory. *Id.* at 241. *Kelley* did not involve the Free Exercise Clause. Indeed, *Kelley* has never even been discussed by this Court in a free exercise context.

The "various other circuits" to which Petitioners refer turn out to be a right-to-travel decision of the Federal Circuit that likewise does not mention the Free Exercise Clause,

Hambsch v. Department of Treasury, 796 F.2d 430, 434 (Fed. Cir. 1986), and a decision of the Eighth Circuit, *Crain v. Board of Police Commissioners of the Metropolitan Police Dept. of the City of St. Louis*, 920 F.2d 1402 (8th Cir. 1990), that quickly disposes of a broad assortment of claims, and that Petitioners cite for the propositions "that the courts must give due deference to municipal agencies" and that the "relational relationship [sic] applies to regulations affecting certain municipal employees." Pet. at 10.

Crain involved a Police Department policy that required officers on paid sick leave to stay home except for visits to their doctors. It was plainly intended to discourage employee abuse of paid sick leave and to shorten the recovery period of those truly ill. 920 F.2d at 1409. And the sole exception to the policy–visits to doctors–furthered the policy's overall purpose. The *Crain* plaintiffs challenged it as an infringement of their right to vote, their right to travel, their right to free exercise and their right to freely associate. Their assorted arguments received only short shrift. (The court, for example, disposed of the Free Exercise Clause argument in the same paragraph as the right-to-vote argument. *Id.* at 1409-10.)

Even so, *Crain*'s analysis, such as it is, does not conflict with the Court of Appeals' decision here. The doctor-visit exemption in *Crain* would not be an unconstitutional distinction for the same reason Judge Alito in this case found the grooming standard exemption for undercover officers not to be an unconstitutional distinction. Petitioners mistakenly think that the "Court of Appeals . . . states that the City of Newark discriminates against the Sunni Muslims, because it does not have a compelling interest for denying a religious exception, although it provides a secular exception *for undercover officers and medical conditions*." Pet. at 15

(emphasis added).

But the Court of Appeals actually held something quite different. Exempting *undercover* officers from the grooming requirement, the court held, was *fully consistent* with the goals of the Department. Pet. App. at 18a. Similarly, the purpose of exempting trips to doctors (and only trips to doctors) from a general policy requiring employees on paid sick leave to stay home is fully consistent with that policy's purpose. In contrast, extending a medical exemption to a favored, secular class of officers "undoubtedly undermines the Department's interest in fostering a uniform appearance through its no beard policy," Pet. App. at 18a, every bit as much as would the religious exemption that Newark resists. The distinction that Newark draws in this case is simply a value judgment in favor of personal secular reasons for not shaving and opposed to personal religious ones. It therefore violates the Free Exercise Clause, whereas the distinction drawn in the policy at issue in *Crain* does not.[4] There is, therefore, no split between the Court of Appeals in this case and the Eighth Circuit in *Crain*.

C. There Is No Split Between this Case and the New Jersey State Courts.

The final alleged split is between this case and a 1973 *per curiam* decision of the New Jersey Appellate Division, *Akridge v. Barres*, 300 A.2d 866 (N.J. Super. Ct. App. Div. 1973), *aff'd*, 321 A.2d 230 (N.J. 1974), *cert. denied*, 420 U.S. 966 (1975). *Akridge* involved a completely different

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[4]Petitioners throw in citations to four older district court decisions (and one summary affirmance by, again, the Third Circuit). Pet. at 12-13. They are all pre-*Smith*. They all concern sick-leave policies. And they are all irrelevant for the same reasons *Crain* is.

challenge to the same grooming standards of the Newark police department at issue in this case (but before the medical exemption and so-called "zero tolerance policy" were added).

The plaintiff in *Akridge* was an officer who challenged the grooming regulations, not under the Free Exercise Clause but simply because he was "expressing [his] individual pride as a black man." *Akridge v. Barres*, 289 A.2d 270, 274 (N.J. Super. Ct. Chancery Div. 1972). Faced with such a novel challenge, the *Akridge* court held that a police department could subject officers to "reasonable regulations having to do with discipline and morale." *Akridge*, 300 A.2d at 867, 122 N.J. Super. 476. There is nothing about *Akridge*–or any of Petitioners' other assorted conflicts–deserving of this Court's attention.

II. PETITIONERS' OTHER ARGUMENTS ARE IRRELEVANT.

Petitioners complain that the Third Circuit found the City of Newark to be engaged in discrimination, "because it does not have a compelling interest for denying a religious exception, although it provides a secular exception for undercover officers and medical conditions. There is no evidence in the record for the court arrive [sic] at this conclusion." Pet. at 15.

This is perplexing for several reasons. First, as discussed above, the Third Circuit did *not* make a finding of discrimination based on the existence of an exception for undercover officers. In fact, Judge Alito specifically stated that the undercover officer exemption did *not* amount to discrimination against the Respondents. *See supra* at 9-10. Second, the Court of Appeals did *not* find that Petitioners had failed to show a compelling interest for its discrimination. It

held that "[t]he Department has not offered any interest in defense of its policy that is able to withstand *any form* of heightened scrutiny." Pet. App. at 19a (emphasis added). Third, there is plainly more than enough evidence in the record to support the Court of Appeals' decision.[5] The District Court found that there was a medical exemption in place, Pet. App. at 38a-39a, and the Court of Appeals agreed:

> In their reply brief, the defendants argue for the first time that the District Court "incorrectly decided the City of Newark has a medical exception." Reply Br. at 14. We will not entertain this argument as it conflicts with the defendants' position both in the District Court and in their opening brief to this court. *See* Defendants' Answer ¶ 3; Brief in Support of Defendants' Motion to Dismiss at 11; Appellants' Br. at 11. Moreover, we are at a loss to understand the defendants' new position given that Memo 97-30 clearly provides exemptions from the "Zero Tolerance" policy for those who "have received medical clearance."

Pet. App. at 15a n.6.

Undeterred, petitioners unveil even more new factual arguments. They now claim that the same medical exemptions whose existence they have in the past variously denied, *id.*, or else blamed on the Americans with Disabilities

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[5]If Petitioners truly thought that there was "no evidence in the record" to support the Court of Appeals' decision, they should at least have filed a petition for rehearing in that court rather than attempt to raise the issue here. *See Rogers v. Lodge*, 458 U.S. 613, 623 (1982) ("this Court has frequently noted its reluctance to disturb findings of fact concurred in by two lower courts"); Rule 10 ("certiorari is rarely granted when the asserted error consists of erroneous factual findings").

Act, Pet. App. at 15a-16a, do in fact exist but are given only "temporarily". Pet. at 16. Petitioners rely for this new notion on language in the Chief of Police's zero-tolerance memo that "Personnel who have received medical clearance shall be documented and updated to ensure that medical clearance is current." Pet. at 15. This proves, at most, that medical exemptions can be withdrawn if they are no longer needed. Likewise, were Respondents ever to convert from Islam to a different religion that does not require beards, they too could lose their right to a religious exemption. But they have no plans to do so.[6]

III. THERE IS AN ALTERNATIVE BASIS FOR AFFIRMANCE

Should this Court grant certiorari, we will defend the judgment below on an alternative basis that the Third Circuit did not reach. That court held that since Plaintiffs prevailed on their theory that the grooming policy was not generally applicable and disfavored religious reasons for not shaving, it "need not reach the plaintiffs' 'hybrid' free speech/free exercise argument." Pet. App. at 10a. In the appeals court, Respondents argued that wearing beards for religious reasons implicated the hybrid rights doctrine explained in *Smith*:

> The only decisions in which we have held that the

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[6]Petitioners also present another, and curious, new factual argument–that all of the officers with medical exemptions are assigned to different duty where they are not exposed to the public. Pet. at 15. Petitioners did not raise this argument below. In any event, this hardly helps Petitioners. It is, in fact, a further admission that officers with medical reasons for beards are treated more favorably than those with religious reasons. Officers with medical conditions are transferred; those needing religious exemptions are in danger of termination.

> First Amendment bars application of a neutral, generally applicable law to religiously motivated action have involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech and of the press.

Smith, 494 U.S. at 881.

Petitioners did not contest below that Plaintiffs are required by their faith to follow the teachings of the Sunnah, which states: "Do the opposite of what the Pagans do, cut the mustaches short and leave the beard (as it is) . . . . Be different from the Mushrikeen, trim your mustache and grow your beards . . . . Clip your mustaches and grow your beard–differ from the Magians . . . . Shorten your moustaches and let your beards grow, be different from the people of the book . . . ." Pet. App. at 25a n.1. By growing their beards, Respondents express the fact that they are Muslim, and more particularly that they are "Sunni Muslims who follow the teachings of both the Holy Quran and the Sunnah." *Id.* at 25a (quotations omitted).

The Respondents' wearing of beards is thus a hybrid right as articulated in *Smith*.[7] That is an argument we would

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[7]The Court of Appeals noted that Respondents below did not "allege a free speech violation in their complaint." Pet. App. at 10a n.4. But a free-standing free speech claim that would succeed on its own is not necessary. The *Smith* Court described *Wisconsin v. Yoder*, 406 U.S. 205 (1972), as such a hybrid rights case involving the right to raise one's child coupled with free exercise. However, *Yoder* did not hold that parents have a fundamental right to remove their children from compulsory schooling once that right is decoupled from free exercise and stands on its own. Indeed, a requirement that the additional liberty

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press if plenary review were to be granted.

In short, this is a far more complicated case than Petitioners seem to realize. For their part, they offer little more than a wild assortment of insubstantial conflicts, together with new factual arguments and an obstinate refusal to address head-on the holding of the Court below. They have certainly not presented any issue in a form that lends itself to review by this Court.

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[7](...continued)
interest that makes a religion claim hybrid be sufficient on its own would render the very notion of hybrid rights superfluous. *See Thomas v. Anchorage Equal Rights Comm'n*, No. 97-35220, 1999 WL 11337, at *10 (9th Cir. Jan. 14, 1999) ("the Court did *not* rest [the hybrid rights decisions described in *Smith*] upon the recognition of independently viable free speech and substantive due process rights."). Accordingly, there should be no requirement that the secondary right comprised in the hybrid be separately pled. It should be sufficient that Respondents did plead a violation of the Free Exercise Clause.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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